Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant

v.

VIRGIL B. STARNES,

Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS
OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT

APPENDIX

APPEAL DOCKETED MAY 27, 1975
PROBABLE JURISDICTION NOTED OCTOBER 6, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1481

AMERICAN MOTORISTS INSURANCE COMPANY,

Appellant,

V.

VIRGIL B. STARNES,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL
APPEALS OF TEXAS
TENTH SUPREME JUDICIAL DISTRICT

E R R A T A T O A P P E N D I X

In the Index:

"Plaintiff's Original Petition" at "Page 1" should be "Page 2".

"Appeal Docketed" at "Page --" should be "Page 19".

Joel W. Westbrook
ATTORNEY FOR APPELLANT

TRUEHEART, McMILLAN, WESTBROOK,
HOFFMAN & RUSSELL
1910 National Bank of Commerce Bldg.
San Antonio, Texas 78205
(512) 226-6291

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Virgil B. Starnes hereinafter referred to as plaintiff, complaining of American Motorists Insurance Company, hereinafter referred to as defendant, and pleads as follows:

I.

The defendant is a liability insurance company incorporated under the laws of the State of Illinois with its registered agent for service in Texas being Clay Cotten, Austin, Travis County, Texas.

II.

Heretofore, the defendant issued its policy of liability insurance to plaintiff Virgil B. Starnes, being Policy No. JA63820, which policy insured plaintiff for damages resulting from an accident with an uninsured motorist and said policy specifically provided that the defendant would "pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily in-

jury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; . . .".

I hereby certify that this notice was served on me by the Sheriff of Travis County, Texas, at 10:15 AM on October 10, 1973.

/S/ CLAY COTTEN
Commissioner of Insurance
State of Texas

III.

That thereafter, on May 29, 1971, on which date said policy of insurance was in full force and effect, Virgil B. Starnes was driving said automobile when it was involved in an accident with an automobile being driven by Herschel N. Burk. Said accident and collision and the resulting bodily injury suffered by Virgil B. Starnes was proximately caused by the following acts or omissions of Herschel N. Burk, each of which constituted negligence:

(a) Operating his automobile at an excessive rate of speed;

(b) Failing to keep a proper lookout.

IV.

That as a proximate result of said collision, Virgil B. Starnes, plaintiff, suffered severe injuries to his body to his damage in the total amount of $10,000.00.

V.

That at the time such accident and collision occurred, Herschel N. Burk was an uninsured motorist as defined under said policy of insurance.

VI.

That all conditions precedent to suit being filed upon said policy have been performed by plaintiff or have otherwise occured.

WHEREFORE, PLAINTIFF PRAYS that defendant be served with citation and that upon final hearing hereof, plaintiff recover against defendant in the amount of $10,000.00, for costs of court and any other relief to which plaintiff may be entitled.

DUNNAM, DUNNAM &
DUNNAM
1000 North 25th Street
Post Office Box 3276
Waco, Texas 76707
By FRED HORNER
Attorneys for Plaintiff

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES AMERICAN MOTORISTS INSURANCE COMPANY, Defendant in the above entitled and numbered

cause, and expressly subject to its Plea of Privilege heretofore filed and without waiving the same, files this, its Original Answer, and by way of such Answer would show unto the Court the following:

1.

This cause of action is barred under the provisions of *Article 5526, V.A.T.S.*, the same having not been filed until the 27th day of September, 1973, more than two years since the cause of action accrued.

2.

Pursuant to *Rule 92* of the *Texas Rules of Civil Procedure*, the Defendant, American Motorists Insurance Company, denies each and every, all and singular, the allegations of Plaintiff's Original Petition, and requires the Plaintiff to prove the same by a preponderance of the credible evidence, as in law he is required to do.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays the Court that judgment be entered that Plaintiff herein take nothing, that Defendant go hence without day and with its costs in this behalf expended, and for such other and further relief to which it may be justly entitled.

SHEEHY, CURETON,
WESTBROOK, LOVELACE
& NIELSEN
By JOEL W. WESTBROOK
1200 American-Amicable
Building
Waco, Texas 76701
Attorneys for Defendant
AMERICAN MOTORISTS
INSURANCE COMPANY

DEFENDANT DEMANDS A TRIAL BY JURY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Original Answer has been forwarded by regular United States mail, postage prepaid, to FRED HORNER, ESQUIRE, at the offices of DUNNAM, DUNNAM & DUNNAM, 1000 North 25th Street, P. O. Box 3276, Waco, Texas 76707, attorney for Plaintiff, on this 30th day of October, 1973.

/s/ JOEL W. WESTBROOK

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

DEFENDANT'S PLEA OF PRIVILEGE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES AMERICAN MOTORISTS INSURANCE COMPANY, Defendant in the above entitled and numbered cause, having been heretofore served with citation to appear herein, and files this, its Plea of Privilege, showing to the Court as grounds therefor the following:

1.

This Defendant, the party claiming such privilege, was

not at the institution of such suit, nor at the time of the service of process therein, nor is it at the time of the filing of such Plea, a resident of McLennan County, Texas, the county in which suit was instituted.

2.

At the institution of such suit and at the time of service of process therein, the residence of this Defendant was, and, at the time of filing this Plea, it is Dallas County, Texas, and at such times the post office address of its attorney, JOEL W. WESTBROOK, ESQUIRE, was and is 1200 American-Amicable Building, Waco, Texas 76701.

3.

No exception to exclusive venue in the county of one's residence, provided by law, exists in said cause.

WHEREFORE, PREMISES CONSIDERED, this Defendant prays the Court to sustain this Plea of Privilege, and that said cause be transferred to Dallas County, Texas.

SHEEHY, CURETON,
WESTBROOK, LOVELACE
& NIELSEN
By JOEL W. WESTBROOK
1200 American-Amicable
Building
Waco, Texas 76701
Attorneys for Defendant

THE STATE OF TEXAS :
COUNTY OF McLENNAN:

BEFORE ME, the undersigned authority, on this day personally appeared JOEL W. WESTBROOK, who, on oath

stated that he is the attorney for the Defendant, AMERICAN MOTORISTS INSURANCE COMPANY, in the above mentioned cause, that he is authorized to verify the foregoing Plea of Privilege, that he is cognizant of the facts set forth therein, and that the foregoing Plea and every statement, allegation, and denial thereof are true.

/s/ JOEL W. WESTBROOK
Joel W. Westbrook

SWORN TO AND SUBSCRIBED BEFORE ME, by the said Joel W. Westbrook, this 30th day of October, 1973, to certify which witness my hand and seal of office.

/s/ HELEN M. CROSS
Notary Public in and for
McLennan County, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendant's Plea of Privilege has ben forwarded by regular United States mail, postage prepaid, to FRED HORNER, ESQUIRE, at the offices of Dunnam, Dunnam & Dunnam, 1000 North 25th Street, P. O. Box 3276, Waco, Texas 76707, attorney for Plaintiff, on this 30th day of October, 1973.

/s/ JOEL W. WESTBROOK
Joel W. Westbrook

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

CONTROVERTING PLEA

TO THE HONORABLE JUDGE OF SAID COURT:

Virgil B. Starnes, plaintiff in the above case, files this his plea controverting the plea of privilege filed herein by defendant, American Motorists Insurance Company and show to the Court that this Court has venue of this cause of action and of the person of said defendant upon the following grounds:

1. Plaintiff adopts and incorporates in this plea each and every allegation in his Original Petition on file herein and makes the same a part hereof for all purposes the same as if set out herein in haec verba.

2. Each and every allegation in plaintiff's original petition on file herein is true.

3. This Court has venue of this cause of action and the person of defendant American Motorists Insurance Company, under and by virtue of Sections 23 and 27, Article 1995, Revised Civil Statutes of the State of Texas, in that it is a private corporation and plaintiff's cause of action or part thereof arose in McLennan, County, Texas, and McLennan County is the county in which plaintiff resided at the time the cause of action or part thereof arose and said defen-

dant has an agency or representative in McLennan County, Texas, and that the defendant is a foreign corporation organized under the laws of Illinois and has an agency and representative in McLennan County, the county where this suit is filed.

WHEREFORE, plaintiff prays that the plea of privilege filed herein by defendant, American Motorists Insurance Company, be in all things overruled and that they recover their costs herein.

DUNNAM, DUNNAM &
DUNNAM
1000 North 25th Street
Post Office Box 3276
Waco, Texas 76707
By FRED HORNER
Fred Horner

I, Fred Horner, attorney for plaintiff in the above cause, having been duly sworn upon oath states that each and every fact set forth in the above controverting plea and in the original petition on file herein is true.

/s/ FRED HORNER
Fred Horner

SWORN TO AND SUBSCRIBED BEFORE ME BY THE SAID Fred Horner on this the 6th day of November, A.D. 1973.

/s/ BRITA BAKER
Notary Public in and for
McLennan County, Texas

The above controverting plea was duly filed this 8th day of November, 1973, and a hearing set on said plea of privilege and controverting plea is at 2:00 P.M. on the 21st day of November, 1973.

/s/ DERWOOD JOHNSON
Judge Presiding

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

STIPULATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

For the purpose of the hearing upon venue the parties hereto hereby stipulate and agree upon the following facts:

1. Prior to May 29, 1971 and at all times subsequent thereto, American Motorists Insurance Company was and is a foreign corporation, organized under the laws of the State of Illinois, and was and is authorized to do business in the State of Texas.

2. American Motorists Insurance Company does presently transact business in the State of Texas and has transacted business in the State of Texas prior to May 29, 1971 and continually transacted business in the State of Texas since that date.

3. That on May 29, 1971, and at all times subsequent thereto, Bill Bailey of Bill Bailey Insurance, located in Waco, McLennan County, Texas, and then owned by Bill Bailey, was duly licensed under the laws of the State of Texas as an insurance recording agent and authorized to transact business as a "recording insurance agency" as evidenced by a true and correct copy of License No. dated issued by the Texas State Board of Insurance. Further, said Bill Bailey d/b/a Bill Bailey Insurance, on May 29, 1971,

was a recording agent for American Motorists Insurance Company, the defendant herein, as evidenced by the Notice of Appointment of Recording Agent dated , said Notice of Appointment of Recording Agent having been duly filed with the Commissioner of Insurance and never having been revoked or otherwise terminated to date.

4. That the said Bill Bailey, d/b/a Bill Bailey Insurance, transacted business in McLennan County, Texas continually as a duly licensed insurance recording agent, as said term is defined in Article 21.14 of the Texas Insurance Code, V.A.T.S., for American Motorists Insurance Company, from May 29, 1971 to date.

5. That as local recording agent for the defendant, American Motorists Insurance Company, Bill Bailey transacting business as Bill Bailey Insurance, has the power and authority to contractually bind American Motorists Insurance Company on policies of automobile liability insurance and further, has the power and authority to accept and collect monies owed to the defendant, American Motorists Insurance Company.

6. As local recording agent for American Motorists Insurance Company, Bill Bailey, transacting business as Bill Bailey Insurance has in the past and at the present time actively solicits business for the defendant, American Motorists Insurance Company.

7. The policy of insurance upon which plaintiff relies in this cause of action was not anywise procured through Bill Bailey or Bill Bailey Insurance.

The above facts are hereby stipulated and agreed to by all parties for the purpose of determining venue and may be used in evidence at the hearing on the plea of privilege duly filed by the defendant and duly controverted by the plaintiff.

AGREED TO:

/s/ FRED HORNER

FRED HORNER, Attorney for Plaintiff,
Virgil B. Starnes

/s/ JOEL WESTBROOK

JOEL WESTBROOK, Attorney for Defendant,
American Motorists
Insurance Company

IN THE DISTRICT COURT OF MCLENNAN COUNTY, TEXAS
74TH JUDICIAL DISTRICT

* * *

VIRGIL B. STARNES
Plaintiff

v.

AMERICAN MOTORISTS INSURANCE COMPANY
Defendant

Cause Number 73-1944-3

APPEARANCES:

For the Plaintiff:

DUNNAM, DUNNAM & DUNNAM
1000 North 25th Street
Waco, Texas 76710
By: Honorable Fred Horner

For the Defendant:

SHEEHY, LOVELACE & MAYFIELD
Alico Center
Waco, Texas 76701
By: Honorable Joel Westbrook

PLEA OF PRIVILEGE HEARING

* * *

BE IT REMEMBERED that upon the Plea of Privilege Hearing in the above entitled and numbered cause, which was commenced on June 28, 1974, in the 74th Judicial District Court of McLennan County, Texas, before the Honorable Derwood Johnson, Judge Presiding, the following evidence was adduced and other proceedings had:

* * *

THE COURT: Proceed.

Mr. Horner: Judge, this is a Plea of Privilege and Joel and I have entered into a stipulation which will be filed and we have one additional stipulation which I would like to dictate to Lillian. That at the time of the collision which is the basis of this lawsuit American Motorists Insurance Company had in full force and effect a valid policy of liability insurance which included uninsured motorist coverage on the automobile operated by the Plaintiff, Virgil B. Starnes. Is that correct, Joel?

Mr. Westbrook: Defendant agrees to that for the purposes of this hearing, Your Honor.

Mr. Horner: It is the Plaintiff's position in this case that this Court has jurisdiction in this cause by virtue of Section 27 of Article 1995 in that those further stipulations which have been entered into between the parties. The Defendant, American Motorists Insurance Company, is a foreign corporation organized under the laws of the State of Illinois. That it was a foreign corporation at the time of the accident which is the basis of this lawsuit. At that time and all times subsequent thereto they had an agent and representative here in McLennan County, that agent and representative

being Bill Bailey Insurance Company. It is further stipulated that Bill Bailey Insurance Company at the time of the collision and at all times subsequent thereto was duly appointed as a local recording agent for American Motorists Insurance Company as that term is defined in the Insurance Code. And it's our position that under the case of Hanover Insurance Company versus Sanford that this satisfies the elements of proof to bring this case within the exception of Section 27.

Mr. Westbrook: What's the citation on that?

Mr. Horner: It's 457 Southwest 2nd 115.

Mr. Westbrook: What's the writ history?

Mr. Horner: Joel, I'm not sure . . .

Mr. Westbrook: If it please the Court, Your Honor, could we have the jacket that has the – it should be on your desk?

The Court: Here it is.

Mr. Westbrook: May we inquire if Plaintiff has any evidence other than that contained in the stipulation they have offered?

Mr. Horner: Not at this time.

Mr. Westbrook: We would ask the Court to take judicial notice of the Defendant's Plea of Privilege filed herein on October 30th, 1973 as well as the Controverting Plea filed November 8, 1973 and in aid of the Court's judicial notice, would ask the Court Reporter to mark with respect to Defendant's Exhibits A and B. We ask the Court to take judicial notice of these. Our position, Your Honor, is that the Controverting Plea, where it takes to rest venue under Sections 23 and 27 and irrespectively, the cases hold Section 27 to be unconstitutional; that it would rest in any event, that the same principles apply as to 23 and 27 and indeed does rest under 23, if at all. We believe that the Plea of Privilege must

be sustained under Lloyds Casualty Insurer versus McCrary, Supreme Court of Texas 1950, 229 Southwestern 2nd, 605 in which rap (sic)[1] by way of dictum stated that "All parties concede that the burden rested on the plaintiff and the interveners to show a cause of action against the insurer to maintain venue in the county where the suit was filed, under Subdivision 23 of Article 1995." Cited Supreme Court Case of "Victoria Bank & Trust Company vs. Monteith." The Court went on to find that a cause of action was indeed shown there. Among the numerous cases (sic)[2] Lloyd's is Ferris Super Market versus Jernigan, Amarillo Court June 8, 1964, no writ history, where in a slip and fall case the District Court overruled the Plea of Privilege, the store operator appealed and Judge Denton, speaking for the Court of Civil Appeals, held that there was no evidence that could sustain the cause of action because of the failure to show that the agent which was identified as causing the slip, had been placed there by the Defendant or that he knew of its presence at the time he slipped on it and recognizing the principle in Lloyds and citing that and other cases, said that it was encumbent upon the Plaintiff in proving cause of action and it hadn't done so and, therefore, the order was reversed and the Plea was sustained. That's all.

Mr. Horner: In reply, I would like to ask the Court to take into consideration and possibly read the Hanover case. It has a long discussion on whether or not under Section 27 cause of action must be proved and the case holds that it does not and that Section 27 is not unconstitutional and I think I can supply the Court with numerous other cases under Section 27 Plaintiff need not prove a cause of action.

The Court: Overrule the Plea of Privilege.

Mr. Westbrook: Please note our exception.

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[1]was
[2]citing

We, the undersigned, Counsel for Plaintiffs and Defendant in Cause Number 73-1944-3 styled Virgil B. Starnes vs. American Motorists Insurance Company, in the Plea of Privilege hearing heard in the 74th District Court of McLennan County, Texas, here agreed that the foregoing is a true and correct transcript of the evidence adduced and other proceedings had upon hearing of said Plea of Privilege.

APPROVED:

/s/ FRED HORNER
Attorney for Plaintiff

/s/ JOEL W. WESTBROOK
Attorney for Defendant

* * *

THE STATE OF TEXAS :
COUNTY OF McLENNAN :

I, Lillian Bruce McDonald, Official Court Reporter in and for the 74th Judicial District Court of McLennan County, Texas, do hereby certify that the above and foregoing is a true and correct Statement of Facts introduced into evidence upon the Plea of Privilege hearing in said cause, including all objections, the rulings of the Court, and exceptions taken thereto, including all exhibits introduced in said hearing.

/s/ LILLIAN BRUCE McDONALD
Lillian Bruce McDonald,
Official Court Reporter in and
for the 74th Judicial District
Court of McLennan County,
Texas

Examined, approved, and ordered filed as the Statement of Facts of the Plea of Privilege hearing in the above cause on this the 18th day of July, A.D., 1974.

/s/ DERWOOD JOHNSON
Judge Presiding

No. 73-1944-3

IN THE DISTRICT COURT
74TH JUDICIAL DISTRICT
MCLENNAN COUNTY, TEXAS

VIRGIL B. STARNES

v.

AMERICAN MOTORISTS INSURANCE COMPANY

ORDER OVERRULING PLEA OF PRIVILEGE

On this 28th day of June, 1974, came on to be heard the Plea of Privilege of the defendant American Motorists Insurance Company, and came the plaintiff and the defendant through their attorneys, and announced ready to proceed on the hearing of the Plea. A jury was waived and the matter was heard by the Court. The Court heard the evidence and argument of counsel and is of the opinion that the Plea of Privilege should be overruled. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Plea of Privilege of the defendant American Motorists Insurance Company is hereby in all things overruled.

SIGNED AND ENTERED this 28th day of June, 1974.

/S/ DERWOOD JOHNSON
Judge Presiding

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
May 30, 1975

Joel W. Westbrook, Esq.
1910 National Bank of Commerce Bldg.
San Antonio, Texas 78205

RE: American Motorists Insurance
Company v. Virgil B. Starnes

No. 74-1481

Dear Mr. Westbrook:

The above-captioned appeal was docketed in this Court on May 27, 1975, as No. 74-1481.

A form is enclosed for notifying opposing counsel that the case was docketed. Also enclosed is a form for the entry of your appearance.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By LORETTA S. RUFFIN
(Mrs.) Loretta S. Ruffin
Assistant Clerk

jmh
Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 6, 1975

Joel W. Westbrook, Esq.
1910 National Bank of Commerce Bldg.
San Antonio, Texas 78205

RE: American Motorists Insurance
Company v. Starnes, No. 74-1481

Dear Mr. Westbrook:

The Court today took the following action in the above case:

"In this case probable jurisdiction is noted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,
MICHAEL RODAK, JR., Clerk
By JUNE M. HOFFMANN
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures
AIR MAIL